

KAUAI PLANNING COMMISSION  
REGULAR MEETING  
**January 13, 2015**

The regular meeting of the Planning Commission of the County of Kauai was called to order by Chair Pro Tem Jan Kimura at 9:13 a.m., at the Lihue Civic Center, Moikeha Building, in Meeting Room 2A/2B. The following Commissioners were present:

Chair Angela Anderson  
Vice Chair Sean Mahoney  
Mr. Wayne Katayama  
Mr. Jan Kimura  
Mr. Louie Abrams

Absent and Excused:  
Mr. Hartwell Blake  
Ms. Amy Mendonca

The following staff members were present: Planning Department – Michael Dahilig, Leslie Takasaki, Dale Cua, Jody Galinato, Duke Nakamatsu; Deputy County Attorney Ian Jung; Deputy County Attorney Adam Roversi

**CALL TO ORDER**

Chair Pro Tem Kimura called the meeting to order at 9:13 a.m.

**ROLL CALL**

Planning Director Michael Dahilig noted there were five commissioners present.

**SELECTION OF CHAIRPERSON AND VICE CHAIRPERSON**  
**APPOINTMENT OF SUBDIVISION COMMITTEE CHAIRPERSON, VICE**  
**CHAIRPERSON AND COMMITTEE MEMBERS**

Mr. Katayama nominated Angela Anderson for Chairperson.

**On the motion by Wayne Katayama and seconded by Sean Mahoney to close nominations for chairperson, the motion carried by unanimous voice vote.**

There were no requests for secret ballot votes. All were in favor by unanimous voice vote.

Mr. Katayama nominated Sean Mahoney for Vice Chairperson.

**On the motion by Wayne Katayama and seconded by Jan Kimura to close nominations for vice chairperson, the motion carried by unanimous voice vote.**

There were no requests for secret ballot votes. All were in favor by raising of the right hand vote.

Chair Anderson selected Jan Kimura as chair of the subdivision committee to which he accepted, Sean Mahoney as vice chair of the subdivision committee to which he accepted, and Louie Abrams subdivision committee member to which he accepted.

### **APPROVAL OF AGENDA**

Mr. Dahilig suggested handling Item J.1., Class IV Zoning Permit Z-IV-2015-9, Use Permit U-2015-8 and Special Management Area Use Permit SMA (U)-2015-7 concerning petition to intervene by Caren Diamond and Barbara Robeson after the agency hearing on Item G.2.b. and also taking I.1. Executive Session at the pleasure of the Commission when time is available.

**On the motion by Jan Kimura and seconded by Wayne Katayama to amend the agenda as read, the motion carried by unanimous voice vote.**

### **APPROVAL OF THE MINUTES**

#### **Regular Meeting of November 25, 2014**

**On the motion by Jan Kimura and seconded by Sean Mahoney to approve the minutes of the November 25, 2014 meeting, the motion carried by unanimous voice vote.**

#### **Regular Meeting of December 9, 2014**

**On the motion by Jan Kimura and seconded by Sean Mahoney to approve the minutes of the December 9, 2014 meeting, the motion carried by unanimous voice vote.**

### **RECEIPT OF ITEMS FOR THE RECORD**

Mr. Dahilig noted two supplemental agenda items with a number of documents that were submitted and circulated to the Commission as well as a memorandum that he will be circulating regarding the intervention item.

**On the motion by Wayne Katayama and seconded by Sean Mahoney to receive the items for the record, all were in favor by unanimous voice vote.**

### **HEARINGS AND PUBLIC COMMENT**

Continued Agency Hearing (None)

New Agency Hearing

Class IV Zoning Permit Z-IV-2015-10, Use Permit U-2015-9 and Special Permit SP-2015-2 to conduct agricultural educational programs and tours within a parcel located along the mauka side of Olohena Road in Kapaa Homesteads, situated approx. ½ mile mauka of its intersection with Waipouli Road, further identified as 5730 Olohena Road, Tax Map Key 4-4-03: 045, and affecting approx. 8.654 acres of a larger parcel = **Steelgrass Farm, LLC**. [Director's Report received 12/9/14.]

Mr. Dahilig noted the three written testimonies that were submitted before the agenda was posted (on file). There were also seven written testimonies submitted after the agenda was posted (also on file).

The Commission received testimony from John Kress, owner of a private property unit in the Lydgate Rise condominium property regime. He asked the Commission to deny all commercial business use permits requested by Steelgrass Farm. It is not appropriate and not compatible with the character with the private neighborhood. Steelgrass Farm has never received permission to use individually owned private property for commercial business traffic. Steelgrass Farm refers to the neighborhood as a subdivision which is not true. It is private property development. The entire 25 acres of the development is privately owned property. There are 18 CPR units; 17 have single family dwelling residences on private property owned by individuals. Steelgrass Farm is not an owner of any property in the CPR development and has no property rights. Since it is not a subdivision, the references to an existing roadway in the application and the Director's report are incorrect. There are no county roads in the CPR development. There is one mile of private driveways, on private property, owned by 16 separate CPR units. The application does not include permission from any of the 16 unit owners for the use of their property as a thoroughfare for their commercial business traffic. He questioned whether by approving the use permits, is the Commission is telling the owners that commercial traffic will drive over their properties without their permission. Since their decision might set a precedence it could lead to many conflicts that may need to be settled in court. He is concerned about having his private property rights taken away from him. It is the Commission's duty to protect private property rights on Kauai.

The Commission received testimony from Renee Lippmann, owner of unit 14 of Lydgate Rise, stated at the time of purchase on 12/20/13 that they would be part of an agricultural, residential association. The previous owners described the setting as peaceful and quiet. They recognized the daily operations of the neighbors and the need for the use of the easement road A for travel. The easement is adjacent to two sides of their home. They have concerns when busses regularly use the road and impacts the residents. Besides the noise, the fumes impact the air quality in the house. They have concerns for the road maintenance by regular use of such heavy travel. They don't want to interfere with the commercial activities of the farm, but they request the elimination of regular bus and large vehicle traffic to transport farm visitors due to the noise, fumes, and wear and tear to the road, not designed to carry regular heavy traffic.

The Commission received testimony from Jim Hughes, owner on Lydgate Rise. They bought their lot 15 years ago and moved back to Kauai in 2003. Their lot is not really suitable for farming in the area remaining after accounting for steep hillsides, building site, and septic system. They grow some veggies, citrus and avocado that they share with neighbors and take the excess to the Food Bank. The Lydgates started conducting chocolate tours in 2007. At several board meetings Will Lydgate was asked if they had permits to which he answered they were all pono at the County and everything was in order. Mr. Hughes thought they were legally operating until the Planning Department issued a cease and desist order to immediately stop commercial tours. They never stopped and are now applying for permits under the name Steelgrass Farm, LLC. He supports the farming industry on the island and realizes that tourism is a huge part of the economy. Commercial farm tours have their place but it is the responsibility of the County to make sure they are held in areas appropriate and suited. Lydgate Rise is an 18 unit agricultural residential CPR and residents access their homes over a series of easements with driveways composed of gravel or concrete. The easements run over individual owner's properties, and are maintained by whichever units they are in favor of. The association has no common element roadway. Unit 3 utilizes easements A & B to access their commercial tours. They run across 11 of 18 units in the CPR from 10 feet to 20 feet in width. These driveways also act as walkways through the neighborhood and it is not uncommon to see a mother with her baby stroller walking down the drive. Steelgrass Farm is bringing in over 5,000 customers a year operating 3 days a week and is asking for an increase to 5 days. They drive through the neighborhood in rental cars, tour busses and school busses. How can it qualify for being a safe and proper permitted use in the development? He has spoken to people who don't understand why anyone would oppose the tours. They don't live in the neighborhood and have to live with thousands of tourists driving through the neighborhood in front of their homes. Not only do the owners have to bear the costs of maintaining the easements, it is disturbance and a liability to the association. He asked for denial of the permits.

The Commission received testimony from Malou Kress, home owner in Lydgate condominium property. When they bought their lot in 2000, Mr. Lydgate assured them that it was a private and very quiet neighborhood. However, because of their commercial business, his promise is broken. For years, they have been dealing with the traffic and deterioration of the driveways and the dust. They don't care about the neighbors and do as they please without consulting the home owners. She urged the commissioners to deny the permits.

The Commission received testimony from Jim Berg who lives in an adjacent CPR. Their CPR has easement access and egress rights through Lydgate Rise and they drive that road every day. They have been living there full time for the last five years. While they see 5 or 6 cars come in at 8:00 a.m. and 5 or 6 cars go out at noon, 3 days a week, they don't see it as a huge detriment to the area. He felt if the parties involved could come to some agreement in terms of improving the easement that would be a great idea and a means of compromise. Where he lives at 5752V Oloheua which is the last house all the way through the Lydgate Rise, he doesn't see that Steelgrass Farm presents a negative impact on the community or the area.

Public member Marj Dente requested providing her testimony after the applicant's explanation of the proposal to which Chair Anderson stated she may.

The Commission received testimony from Debbie Nakamura. Her husband and she own property at 5840 Olohena Road and a parcel of their land adjoins the Lydgate property. They are a small, family owned agricultural endeavor. They support any agricultural projects in the area. They see that agriculture is important to the island and small operations are having more of a struggle to survive. They support what they know of the Steelgrass Operation because they deserve that opportunity to survive as the island becomes more and more developed. They want to see more of the small family operations being able to survive.

Mr. Dahilig noted they also received testimony against the matter from Paul Errigo, and testimony in opposition from Susanne Gould. The Department recommended keeping the agency hearing open and requested deferral on the agency hearing alone for the next meeting.

There was no further testimony.

**On the motion by Sean Mahoney and seconded by Louie Abrams to defer the agency hearing, all were in favor by unanimous voice vote.**

Class IV Zoning Permit Z-IV-2015-9, Use Permit U-2015-8 and Special Management Area Use Permit SMA(U)-2015-7 to allow conversion of an existing residence into a bed and breakfast operation on a parcel located along the eastern side of Alamihi Road in Wainiha, situated approx. 300 ft. mauka of its intersection with Kuhio Highway, further identified as 7083 Alamihi Road, Tax Map Key 5-8-012: 022, and containing a total area of 11,827 sq. ft. = Kirby B. Guyer/Milton Searles.

The Commission received testimony from Gail Hunter. She said they have a situation on the end of the road that involves a lot of vacation rentals and they also have a stunning home that was built primarily to enhance the trip to Kauai for many people which is a limited little place about 2 city blocks from the Hanalei Colony. It's Milton, but they call it Toby and Kirby who have been in her purview of knowledge for about 14 years. She has never met people that present a concierge expression of Kauai in such a gracious fashion. She lives around the corner, on Powerhouse Road for over 20 years. Toby and Kirby not only care for their guests, they care for the community. There have been donations to Waipa Farms and the Humane Society. They incorporate the community into what they do. Kirby has lived here for 30 years and has studied Hawaiiana, does hula and is very involved in the community. They present themselves as probably the best neighbors she has ever had. She worked in Hanalei for a long time, prior to and after the initiation of vacation rental theory. She has seen homes with 15 people in them. In Kirby's home, every guest knows where it is dangerous to go, what time the traffic is bad in Kapaa. She spends time to make them special guests that are able to intergrade into the community in a comfortable way. She can't ask for more than that. They have done this for a very long time and they are very good at it.

The Commission received testimony from Mark Pearson, who has been on the island for 23 years, mostly in the bed and breakfast business. Toby and Kirby have built their accommodation perfect for a home stay or bed and breakfast environment. Their common area is family oriented. Their guests leave the best reviews he has ever read of a stay on Kauai. They are an asset to the community, they are very charitable, and they are very concerned about the

neighbors. There is adequate infrastructure as far as parking. There is no impact from the few cars on their property. The County has had shortcomings for many years. There was a moratorium on vacation rentals and things are moving forward. In consideration of petitions against Kirby, some people think that if they home stays and vacation rentals are done away with, it will free up the properties for long term rentals. They will not become long term rentals because it doesn't work that way. If you have a quality house and go long term rental, it's not going to stay that way. There is a need for home stay because it is an experience for the tourists that will not stay at a hotel for \$400 a night. They need a place to stay and Kirby and Toby have provided an excellent place to experience Kauai in the aloha fashion and they get to see hula in the house.

The Commission received testimony from Christine Spahl who moved to the island in 2010, about the time she got to know Toby and Kirby. She was invited to their 4<sup>th</sup> of July party on Kalihiwai Ridge and was introduced into hula. They are also neighbors. She has a cleaning business and since half a year she has been cleaning the general area and the rooms in her home stay. The guests are part of the family. She was very impressed at how they interact with the guests and how they explain the culture. There is not a huge noise level, everyone comes home and cooks together and goes to bed. Everyone has their own TVs in their room and there is quiet time after that. It is set up perfectly for a scenario like that. There are parking spaces under the house and the highway is 100 feet away. She does not know what could be more perfect than their place and she is glad to work with them. She hopes they can operate for many years.

The Commission received testimony from Kalaya Delmars who has known Toby and Kirby for 15 years, her entire time on the island. They shared a one acre property for seven years, they had a B&B on that property. There was never any excessive noise or parking issue. They welcome visitors to their home where they live. They create a family atmosphere that elicits family values and respect for others' peace and property, honoring the aina. Hula and Hawaiian culture are very much expressed in their home to their guests. Kirby was instrumental in aligning her to the Hawaiian spirit and letting go of her push and shove attitude from California. They create for their guests that understanding of peace and aloha that is our island. Their guests become family and come back to visit Toby and Kirby to be in that spirit of aloha which is their home. They have ample designated off street parking. They are only one house from the highway. There is no noise impact on the neighborhood as these are guests that have chosen to be in this B&B home environment. The party people are more likely to go to the party zone in Hanalei where people are renting property, and the owners are not paying taxes, and not living on the island. Those are the businesses just trying to profit from this island and not have any respect or care for this island and its people. This is a family owned and resident operated B&B. They have been locals for over 30 years and they deserve to make their living at a home they created that is ideal for the guests' comfort and the home atmosphere where they all gather to cook together, to dance hula, and enjoy being a part of this family. They pay their taxes, support local business and domestic workers, and they are ambassadors of aloha.

The Commission received testimony from Colby Coombs, the owner directly behind Toby and Kirby. He shares two borders of this property with them. He has been living there for five years and have never experienced any sign of traffic or noise or any sign that there is a business operating there. He never felt that he was living next to a commercial lodging

establishment where there are weddings and people up all night partying and celebrating. His parents stayed there for a couple of weeks and he got the opportunity to spend time there. He noticed all the clientele appeared to middle aged, or young people, or elderly people that were quiet, and they mind their own business. He feels safe there. Toby watches over the place and cares about the neighborhood and mows their lawn. He is not impacted at by the business, they are the best neighbors he has had anywhere and he doesn't see any issues with their operating the B&B.

The Commission received testimony from Caitlin Palmer, who lives directly to the north of the property in question. She echoed what everyone else has said; there are no parking issues, no noise issues, and it is a small home stay of only four rooms. Guests are intergraded as family and it is an appropriate business for the area that is residential in zoning. They are fabulous neighbors, increasing the safety of the neighborhood, looking out for the whole street. She appreciates that they are there and can earn a living there. She has a young daughter that used to go to bed early and the whole neighborhood is quiet from 8:00 p.m. It is a calm, peaceful, residential area, with their existing business. She urged the Commission to support the business there.

The Commission received testimony from Sharon Mahtia Mahuiki who agreed with everything that has been said earlier. She has stayed there many times and it's all under one roof; it's their home. There is every film for their guests, every book, every educational thing to learn about the island to show their guests what Kauai really is. Toby and Kirby provide help for everyone and they really support the island. He rolls out their BBQ for every event. The issue is whether this is a home that is operating as a B&B and followed the regulations and she said they have in that respect. She urged the Commission to make sure justice is done.

The Commission received testimony from Gracious Robert. She and Kirby met 37 years ago and they became roommates at that time. Her vision and soul and heart has been the island and making it her home. Ms. Robert and her husband stayed at the previous B&B until they finally bought their own home and she would still stay at the B&B because it is family and home. She can't recommend anything more honest and true than they are for the island. She highly recommends their home, their B&B, and for the Commission to be a part of their continuing their life here.

The Commission received testimony from Mary Lou Harchiss. She has been a friend of Kirby for over 60 years. Kirby was the first person she came to when she moved here 15 years ago. She has known her vision of what she wants to provide their guests. They have built the most wonderful bed and breakfast you would ever hope to stay in. They are so gracious, they are so aloha, they are not the vacation rental. They are nothing else but a family that wants to provide a family environment for all their guests. They only have a few rooms that they rent out as a bed and breakfast and they live in one of the rooms. They share their meals. They provide a breakfast. Any guest that wants to know where to go for a boat ride, a hike, a restaurant, she has all the information. She goes with them sometimes. They are the most aloha people. They provide so much fun for their guests. It's peaceful, it's quiet, and they have off road parking for every guest and other people that want to visit. There is no negative impact in the neighborhood and they are the most precious people you would want to have on the island.

The Commission received testimony from David and Charlotte Rees. Mr. Rees stated his mother read an article in the Los Angeles Times 30 years ago asking if there is anything left of the old Kauai talking about the new hotels, the gondolas, and the Greek statues. They talked about a little one bedroom B&B on Kalihiwai Bay where his mom originally stayed. He stayed in their second location and their current location. For the last five years they have been his best of neighbors. They are the quietest of his neighbors and the largest ambassadors to the island that he knows. Kirby is involved in lei making, hula, and originally brought his mom to the polo grounds. They have no negative impact to the neighborhood. Mrs. Rees stated she has been coming here forever and she couldn't say anything negative. They are wonderful.

The Commission received testimony from Karvel Rose. He has known Toby and Kirby for many years. He supports the testimony that has been given today. He is concerned about the vacation proliferation in neighborhoods and he applauds the County for trying to limit the impact of vacation rentals that do exist. However, this is not a vacation rental. It is not in the VDA, but he lived in a complex with vacation rentals for nine years and it wasn't the most pleasant nine years on Kauai. Here they have stewards of the house, they live in the home, they are accountable, they are on-island at all times, they take care of the property and take care of their neighbors. Any B&B that doesn't is foolish and won't get business. He urged the Commission to support the variance.

The Commission received testimony from Marj Dente. She emphasized that this is not a vacation rental. She was forced to live next to two illegal vacation rentals that rented out their properties for weddings and big parties, always with alcohol. There were people driving out of her dangerous driveways from vacation rental properties at 3am, partying all night. Kirby and her husband are very responsible people. They stay in their bed and breakfast, they maintain the noise level if any, as well as the educational issues that have been brought up. These are so important in these times of stress in the world. More people need this kind of attention that visit Kauai. She supports the proposal and asked the Commission to not consider it a vacation rental. It is a bed and breakfast with the owners in presence at all times. There is such a large difference.

The Commission received testimony from Sadaya Jaret. She has known Kirby and Toby for about two decades. She started dancing hula off island and met them by staying at the B&B. Over the last two decades she has worked off and on to assist them. It's good that the Commission is looking at the issue of vacation rental versus bed & breakfast because there is a difference. When she walks from where she lives, there are a lot of large homes waiting for the next vacation person to spend a week. At Kirby's place, the street is quiet, there are no extra cars on the street. The loudest thing you hear are the neighbors' dogs down the street. All the cars are tucked away under the house. She has helped with the books and she can assure that they are very fastidious making sure everything is paid for and up to date. The most important thing is to make lists of all the people who stayed because she wants to send thank you cards. She can attest to everything echoed today. During the two decades, they have been there for each other. She has three daughters and Kirby has been there for all three. This is the kind of organization that would benefit the County with proper taxes, benefit the tourists for a nice place that they can afford to stay where they can get a sense of aloha and relax, and also work for the community.



This is the kind of ohana they want as an example in the community. She hopes the Commission will move forward and approve the application.

The Commission received testimony from Coco Kanealii. Aloha is something a lot of vacation rentals lack. His wife was a manager for one of the largest real estate agencies in the state. He got to see some million dollar houses, not homes. A home is where a human occupies with family. To open your home to a stranger and greet them with aloha is something you don't see at hotels. You get a meal, refreshments, entertainment. With Hale Ho'o Maha you get an experience. He has known this couple for over 30 years and did their wedding ceremony 25 years ago. Every year they celebrate with the largest ongoing 4<sup>th</sup> of July celebration on the north shore; public invited, Hawaiian style. They are not of the blood, but he would put them up against anybody. They learned the ways. Mahuiki, Maka, Chandler, Yokotake, are just a few of the Hawaiians that lived there, and they bring that with them to the visitor. She is a hula dancer, he is a mechanic. She is also a well-known lei maker who has won many championships judged by Irma Lee Pomoroy. Kirby and Toby have a place here. As a matter of semantics, what is a home? What is a vacation rental? They greet their people coming and going. People return. As a musician and entertainer, they fill his clubs with their people. Employees are recipients of their kala and their mana. In consideration he asked the Commission to avoid semantics if possible and stay with the aloha.

The Commission received testimony from Martin and Mary Sharett who live next door to Toby and Kirby. He has been there since before their house was built. There has never been any noise there that has woken them up. They keep the yard in immaculate shape. There is no impact at all and they are great people. Ms. Sharett noted there is no negative impact, but they do have a huge impact on the community because of the people they are. Toby is a very good steward of the neighborhood and the aloha they bring to the neighbors and incoming guests is priceless. This is not a vacation rental. This is a bed and breakfast.

There was no further testimony.

Mr. Dahilig noted a petition for intervention has been filed on this matter. He recommended deferring the decision to keep open or close the agency hearing until disposing of the petition for intervention.

**On the motion to Sean Mahoney and seconded by Louie Abrams to table closing of the agency hearing, the motion carried by unanimous voice vote.**

## **GENERAL BUSINESS MATTERS**

Class IV Zoning Permit Z-IV-2015-9, Use Permit U-2015-8 and Special Management Area Use Permit SMA(U)-2015-7 to allow conversion of an existing residence into a bed and breakfast operation on a parcel located along the eastern side of Alamihi Road in Wainiha, situated approx. 300 ft. mauka of its intersection with Kuhio Highway, further identified as 7083 Alamihi Road, Tax Map Key 5-8-012: 022, and containing a total area of 11,827 sq. ft. = Kirby B. Guyer/Milton Searles.

Petition to Intervene by Petitioners Caren Diamond and Barbara Robeson (1/7/15).

Planning Department's Memorandum in No Opposition to Caren Diamond and Barbara Robeson's Petition to Intervene (1/7/15).

Chair Anderson questioned if the petitioners had anything they wanted to add to which Ms. Robeson replied they did not.

Chair Anderson questioned if the Department confer with the position of the petitioners to which Attorney Roversi, representing the Planning Department responded that the Department takes a position of no opposition and will allow the interveners and underlying petitioner to make their case before the Commission.

Chair Anderson asked the applicant to state their position regarding the intervention to which Jonathan Chun, representing the applicant, replied that without further information from the petitioners, the applicants would oppose the petition for intervention. The primary concern runs on two bases. One is that they believe it is untimely; the Rules specifically state the petition needs to be filed and served no later than seven days prior to the hearing, and they received it on Friday. The other more important is what is the interest of the petitioner? An intervention severely delays the proceeding. There are contested case hearings regarding interventions that have been on the agenda for at least a year or more. The use permit is essential to the livelihood of the applicant and to have that permit application and decision held in abeyance for a year or more will basically send a signal that we don't care about you, we are going to destroy your home and livelihood just because of a procedural matter. It would be entirely unfair to the Commission. If it is going to result in delay, they would oppose it because it has a higher impact on his clients than anyone else. If the Commission is going to consider granting the petition, they should consider the delay on the client and whether or not they actually have met the criteria for intervention. The Rules state all persons who have an interest in the property who lawfully reside in the land can intervene. He said the two petitioners do not reside in the land. The other criteria is that they can otherwise demonstrate that they would be so directly and immediately affected by the proposed application that their interest in the proceeding is clearly distinguishable from the general public. He has not seen anything in the petition to support that. The petitioners are asking to be given the right to intervene on the grounds that they have done research in the area of transient vacation rentals. They have heard from many speakers that this is not the same thing. The petitioners also said they are interested in issues of flood, but it is not an issue there and is not an issue different from the general public. They can bring their information, their concerns, and their testimony at all proceedings; there is no objection on that. But they can do that in this forum without intervening. The real purpose of an intervention is to delay, because if it is to bring information, a point of view, they can do that without intervention. It is his client's position that if an intervention is going to delay, it should be denied.

Ms. Diamond stated they believe it is correct for them to intervene as they both live in Wainiha and have been residents for over 35 years. Changes in their neighborhood has created problems and issues that they have studied extensively. This application is asking the Commission not to shut their business down. It has been operating for a very long time, but that is not our burden because they are coming in for a use permit. Bed & breakfasts will impact the neighborhood as vacation rentals have. It is appropriate to completely flush out all of the issues associated with having more resort uses in the neighborhood than are permitted. She did not

believe they can address the many issues in 3 minutes. The application also has numerous errors that would take more than 3 minutes to address. They are not here to delay the proceedings. If it were not already an operating B&B there would be no delay. She believes it would have been proper for them to come for permits first.

The Commission recessed at 10:27 a.m.

The Commission reconvened at 10:40 a.m. (Mr. Kimura was not present)

Chair Anderson asked Attorney Jung to address the Commission regarding their options on the table.

Attorney Jung stated under Chapter 4 of the Rules of the Planning Commission there are three options; go into executive session to understand the law as written in the rules, have the parties brief the matter and ask for written submissions for the next meeting, or take action on the intervention and move forward on scheduling the contested case hearing before the Planning Commission and the chair would serve as the presiding officer. An intervention would lead to the next step of contested case hearing and setting up an evidentiary hearing before the presiding officer and the Commission at a later date.

Mr. Katayama questioned whether there was a ruling on whether the interveners met the statutory requirement for filing to which Attorney Jung replied that when making a ruling you need to look at the procedural aspects and the substantive aspects. The petition to intervene was file stamped on January 7 with a check dated January 7 and a certificate of service dated January 7 signed by both Caren Diamond and Barbara Robeson. The Rules state the petitions to intervene shall be in writing and shall be filed with the certificate of service with the Planning Commission at least 7 days prior to the agency hearing for which the notice to the public has been published pursuant to law.

Mr. Katayama asked for clarification that procedurally they have met the standard to which Attorney Jung replied it is a decision for the Commission as a judicatory body. The Commission can have the parties brief it or they can go into executive session to discuss the components of standing. They have to meet procedural and substantive requirements.

Attorney Jung read into the record that the Commission may go into an executive session on an agenda item for one of the permitted purposes listed in Section 92-5(a) Hawaii Revised Statutes, without noticing the executive session on the agenda where the executive session was not anticipated in advance. HRS Section 92-7(a). The executive session may only be held, however, upon an affirmative vote of two-thirds of the members present, which must also be the majority of the members to which the board is entitled. HRS Section 92-4. The reason for holding the executive session shall be publicly announced. He said there needs to be motion to go into executive session to discuss issues relating to the rules at it relates to Chapter 4 and discussion with counsel on those rules.

Chair Anderson stated that she would like to combine it with the other executive session item.

Attorney Jung read into the record that Pursuant to Hawaii Revised Statutes Sections 92-5(a) (2 and 4), the purpose of this executive session is to discuss matters pertaining to the evaluation of the Planning Director. This session pertains to the Planning Director's evaluation where consideration of matters affecting privacy will be involved. Further, to consult with legal counsel regarding powers, duties, privileges and/or liabilities of the Planning Commission as it relates to the evaluation of the Planning Director.

**On the motion by Wayne Katayama and seconded by Louie Abrams to move into executive session to discuss issues relating to the rules as it relates to Chapter 4 and discuss with counsel those rules, and to incorporate the Director's evaluation, the motion passed by unanimous voice vote.**

The Commission moved into executive session at 10:57 a.m.

Chair Anderson called the regular meeting back to order at 11:34 a.m. (5 Commissioners were present) She asked the applicant and interveners if there was anything they would like to add.

Mr. Chun noted for the record that while they believed petitioner Robeson lives in Wainiha, she lives next to the stream and not in the immediate vicinity; definitely not within 500 feet. He was not aware where petitioner Diamond currently lives. He believes they did not meet timeliness and there was no explanation as to why they did not meet the timeliness. The petition does not indicate in any way how they will be immediately and directly affected if their petition is denied and there are no supporting facts.

Ms. Robeson noted that the rules state the petition for intervention with certificate of service shall be filed with the Commission at least 7 days prior to the agency hearing which they did. In the petition, they stated their interest is in the health, safety, and welfare of residents and visitors on the north shore including Wainiha and the specific issues to be raised are listed. They feel their request for intervention fully met the criteria.

Ms. Diamond added they have been granted standing before the Hawaii Supreme Court on issues related to shoreline, setback and issues in Wainiha.

Wayne Katayama moved and Louie Abrams seconded to grant intervention status.

Mr. Kimura questioned if they can still ask for a briefing once intervention is granted to which Attorney Jung noted the next step would be scheduling the prehearing conference with the presiding officer which would be the Chairperson. At that meeting they would schedule the evidentiary hearing before the body.

Chair Anderson noted issues were raised regarding procedural and substantive matters pertaining to intervention. She questioned whether the Commission finds that they have met the procedural timeliness. Mr. Katayama stated that in his motion he feels the interveners have met both the filing deadlines as well as the criteria for intervention and is therefore asking the

Commission to take action on their status as opposed to any part of it. If there are issues on either side, they can discuss it among the Commission.

Mr. Kimura questioned if they need to make a motion on what Mr. Katayama stated and then make another motion on intervening to which Attorney Jung replied the motion is to grant intervention status which wraps up both issues; procedural as well as substantive. The rules state the petition for intervention shall be filed with the Commission within 7 days prior to the agency hearing. The Commission rules are silent as to inclusion of the last date but the Hawaii Rules of Civil Procedure, Rule 6 for computation of time, includes the last day which is the hearing date.

Commissioner Abrams stated he believed the petitioners have sufficient qualifications to weigh in on other issues relating to this and may have information for the Commission in drafting their decision.

**On the motion by Wayne Katayama and seconded by Louie Abrams to grant intervention status, the motion carried by unanimous voice vote.**

Mr. Dahilig stated that as clerk of the Commission, he circulated a memorandum asking for delegation of authority to obtain a hearings officer to serve on behalf of the Commission to hear motions, receive evidence, and provide a recommended findings of fact, conclusion of law, decision and order for Commission entertainment. Stipulated to the request he would report back to the Commission regarding the ability to secure a hearings officer. The other option would be for the Commission to handle the contested case hearing.

Chair Anderson questioned how the Commission would like to proceed to which Mr. Kimura replied he would like to hire. Mr. Katayama stated he would be in favor of retaining a hearings officer.

Mr. Abrams questioned if funds were available to which Mr. Dahilig stated he will be requesting movement of funds within the budget to accommodate the request and will report back at the next meeting if they were able to transfer the funds.

**On the motion by Jan Kimura and seconded by Louie Abrams to delegate authority to the clerk of the Planning Commission to obtain a hearings officer to serve on behalf of the Commission to hear motions, receive evidence, provide recommended findings of fact, conclusions of law, decision and order for Commission entertainment, the motion carried by unanimous voice vote.**

Mr. Chun questioned if the public hearing was going to continue today or not.

Attorney Jung stated procedurally they will know at the next meeting whether or not they can procure a hearings officer. If there is no hearings officer then the Commission will hear it and schedule a preconference hearing with the presiding officer being the chair of the Commission.

Mr. Dahilig stated he will be making a recommendation to close agency hearing given that a contested case hearing is now proceeding.

Mr. Chun stated that his client operated for 12 years as a bed and breakfast. They designed the house and based their financial household upon a bed and breakfast. All of a sudden they got a letter from the Planning Department telling them they have to stop. They recognized that there is some ambiguity in the CZO whether a bed and breakfast is a home business or not. If it is a home business, there is no permit requirement. In good faith, the applicant stopped renting their house as a home stay which has created a huge financial burden. He felt in all fairness they should be allowed, until the contested case hearing is resolved, to go back and operate under a home business situation at least temporarily. He is very concerned that the delay will amount to months if not years. It is not fair to the applicant, in good faith trying to work with the County and do the right thing, being shut down because of the County's inability to get things done on a timely basis.

Mr. Dahilig stated that pursuant to HRS 46-1.5 (24), the fine authority concerning enforcement is premised upon the opportunity for a violator to come into compliance with the law. In this particular case, as part of the compliance plan, they are afforded an opportunity to apply for the permits as after the fact permits. Because of that, they look at the cease and desist order as stayed until the issue is resolved. They do not take any further enforcement action in terms of enforcing the cease and desist order if it is being challenged as you see in this particular case. He views this particular activity as part of the compliance plan.

Mr. Kimura stated it seems like they are great stewards for their property and their business, but it is not the individual they look at. It is a permit on the land they look at. The next steward may not be as great as this steward. If they allow one to continue to operate illegally, they will have to allow every contested case to continue running.

Mr. Dahilig noted that if you cannot apply for the permits in the first place, like in the case of vacation rentals outside the VDA, they will not even entertain the application as a means of compliance with any cease and desist order. For this particular circumstance, this is what is afforded to them to come into compliance with that law. As Mr. Chun mentioned, this is an area of grey in the law that needs to be sorted out through a use permit, which is a means of compliance.

Mr. Abrams stated he concurs with the action of the Planning Department and the philosophy. If there is something they need to do regarding a letter to the applicant, he would like to support it to which Mr. Dahilig replied the department can work with the applicant on that.

Mr. Katayama stated if that is the stance of the department, they should not be issuing a cease and desist order because that is a very specific call to action. If they have in this matter a grey area which they are affording the operator to remedy, they should issue a different kind of letter rather than a cease and desist; a compliance order. If the applicant fails to respond, then a cease and desist order should be issued. He questioned if it is a currently illegal operation.

Attorney Jung stated the Department appears from its previous stance to have said that a bed and breakfast, now defined as a home stay, is similar in use to that of a boarding house which triggers the requirement for a use permit. If they are operating on a home stay, then under the department's interpretation, it's illegal. When you go through administrative enforcement, the goal of the law was wanting to bring people into compliance. The reality is while they are going through the process, the Commission does not have injunctive powers. You can tell them to cease and desist or they will be fined. If there is a fine that is issued, they have to pay that fine unless they appeal then it goes to the Commission or the Courts. The department has enforcement discretion. If that's the approach they want to take, that's their call. How the Commission views it, is also up to the Commission. They just don't have injunctive powers to force somebody to do something. The Courts of the fifth circuit have that power.

Mr. Kimura stated that he feels if you are running something illegal, it's illegal. Cease and desist, that's it. Whether they are the best stewards in the world doesn't matter, it runs with the land. If what they are doing is illegal, they shouldn't have done it to begin with. Get the proper permits, then operate. Because it's illegal, it should stop. Whether the Commission has the power to stop it or not, they have the power to fine. It's nothing personal, but something illegal is illegal. He felt they shouldn't be given the permission to continue to operate until they comply. If they do, that's where the fine comes in.

Mr. Dahilig clarified that in terms of the permitting and the enforcement history, they'll raise those matters at the contested case hearing. He noted that Mr. Katayama is correct that usually the procedure is a zoning compliance notice first, then a cease and desist upon the second notice. He wasn't able to confirm if that was the situation here.

Mr. Katayama questioned if this is a timing issue for a home stay where they were operating a home stay prior to their need for a use permit to which Mr. Dahilig confirmed that this is an after the fact permit.

Mr. Katayama questioned whether at the time they established a bed and breakfast use, there was no permit required to which Mr. Dahilig replied this type of use is distinguished from single family transient vacation rentals. From a history standpoint, they have a number of permitted bed and breakfast that have class IV use permits. The precedence has already been set through previous commissions and administrators that the interpretation of this type of use and the permitting requirements are set. This is not a novel issue before the Commission.

Attorney Jung suggested that because this matter is now going to into contested case hearing and evidentiary hearing that all questions relating to the issues evolve from that process.

Mr. Kimura questioned whether Mr. Chun's concern had been addressed to which Mr. Chun stated that his intent was not to force the Commission to do anything and it is acceptable to work it out with the Planning Department. He just wanted to inform everyone what his issues were ahead of time.

Mr. Dahilig clarified for the public that there will be no further presentation concerning the home stay permit because they are in contested case.

Continued Public Hearing (None)

New Public Hearing (None)

All remaining public testimony pursuant to HRS 92 (Sunshine Law)

There was no public testimony regarding any other agenda item.

## **CONSENT CALENDAR**

### Status Reports

Sixth Annual Status Report for Special Management Area Use Permit SMA(U)-2008-05, Use Permit U-2008-4, Class IV Zoning Permit Z-IV-2008-6, Tax Map Key 5-2-012: 035, Kilauea, Kauai = Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002 and West Sunset 32 Phase 1, LLC, a California Limited Liability Company.

Director's Report pertaining to this matter.

Director's Report(s) for Project(s) Scheduled for Agency Hearing on 1/27/15.

Class IV Zoning Permit Z-IV-2015-8, Project Development Use Permit PDU-2015-7, Variance Permit V-2015-1 and Special Management Area Use Permit SMA(U)-2015-6 to permit repair and reconstruction of the former Coco Palms Resort including but not limited to: 350 hotel units, Lotus Restaurant and Flame Room Bar, the Lobby Building, the Commercial Building, three swimming pools, Queen's Audience Hall, the Palms Lanai, Sea Shell Restaurant, Chapel in the Palms, 2 of 4 Bridge Crossings; the construction of a new Utility & Maintenance Building and a new Queen Lagoon Building into a spa and gym facility on the site of the previously demolished structure. The project is situated in Wailua and located at 04-241 Kuhio Highway, further identified as Tax Map Keys 4-1-003: 004 (por.), 005, 007, 011, and 017 and 4-1-005: 014 and 017, and containing a total area of approx. 28.523 acres = Coco Palms Hui, LLC.

Director's Report pertaining to this matter.

### Shoreline Setback Activity Determination

Shoreline Setback Commission Review SSCR-2015-05 and Shoreline Setback Determination SSD-2015-18 for a shoreline activity determination, Tax Map Key 5-8-010: 014, Unit 3, Wainiha, Kauai, for acceptance by the Commission = Pierce & Keely Brosnan.

Director's Report pertaining to this matter.

Shoreline Setback Commission Review SSCR-2015-06 and Shoreline Setback Determination SSD-2015-23 for a shoreline activity determination, Tax Map Key 2-6-012: 001, Lawai Bay, Kauai, for acceptance by the Commission = David & Annette Jorgensen Revocable Trust, Owner.



Director's Report pertaining to this matter.

Shoreline Setback Commission Review SSCR-2015-07 and Shoreline Setback Determination SSD-2015-24 for a shoreline activity determination, Tax Map Key 4-3-009: 050, Wailua, Kauai, for acceptance by the Commission = *GCT Properties*.

Director's Report pertaining to this matter.

Shoreline Setback Commission Review SSCR-2015-08 and Shoreline Setback Determination SSD-2015-26 for a shoreline activity determination, Tax Map Key 1-8-008: 043, Hanapepe, Kauai, for acceptance by the Commission = *County of Kauai, Department of Parks and Recreation*.

Director's Report pertaining to this matter.

Chair Anderson questioned if members of the Commission would like to take any of the items out of consent calendar to which Mr. Kimura requested the Charles Somers case. Mr. Mahoney seconded the request.

**On the motion by Jan Kimura and seconded by Wayne Katayama to accept the consent calendar absent the Charles Somers matter, the motion carried by unanimous voice vote.**

#### **COMMUNICATION (For Action) (NONE)**

#### **COMMITTEE REPORTS (NONE)**

##### Subdivision

Mr. Dahilig noted there was no subdivision committee report because there was no subdivision committee meeting this morning.

#### **UNFINISHED BUSINESS**

Mr. Dahilig noted there was no unfinished business.

#### **NEW BUSINESS**

Sixth Annual Status Report for Special Management Area Use Permit SMA(U)-2008-05, Use Permit U-2008-4, Class IV Zoning Permit Z-IV-2008-6, Tax Map Key 5-2-012: 035, Kilauea, Kauai = *Charles Somers, as Trustee of the Charles Somers Living Trust dated November 12, 2002 and West Sunset 32 Phase 1, LLC, a California Limited Liability Company*.

Director's Report pertaining to this matter.

Staff Planner Jody Galinato read the Director's report into the record (On file)

Mr. Kimura questioned what has been done thus far about the building that was put up to which Ms. Galinato replied the house is final but the conditions have not been met.

Mr. Kimura questioned the maintenance building to which Ms. Galinato replied it is going to have to be an after the fact permit.

Mr. Kimura questioned why they put up something without a permit to which Mr. Dahilig noted they have been advised that it needs to be permitted. It was suggested that they either need to take the building down or the Department is going to move forward with formal enforcement or they can fold it into the permit amendments currently pending before the Commission.

Max Graham representing the applicant stated that he would be happy to respond to any questions specifically regarding the Director's report.

Mr. Kimura questioned, as far as working it out with the Kilauea Neighborhood Association and the community, if the representative would reconsider the right of way to the falls, talking with the applicant to see if there is something to work out, and report back to the Commission within 30 days to which Mr. Graham stated that would be fair. He has no authority to resolve it himself but he would be happy to take the request to the owner and come back in 30 days and respond.

Mr. Kimura stated that being a resident of Kilauea and part of the community, he still has to keep trying.

Mr. Abrams stated that the conclusion of the staff report notes that not all of the conditions have been complied with. He asked for an outline of the expected progress to which Mr. Graham stated he would be happy in 30 days to bring the Commission up to date. He needs to meet with the department to resolve the issue of the structure. It is a like a greenhouse structure; a metal frame with plastic and is movable. He just needs to find out how to resolve that issue. Between now and the next time he appears before the Commission, he will have met with Public Works and Planning concerning the scope of what needs to be done to complete the improvements to Kahili Quarry Road. There is question about access P1 to the easement which runs in favor of the County. When he meets with Public Works he will also talk about if they want to improve it or at least look at it. He should also have a final draft of the conservation plan that has to be submitted to the Hawaii Island Land Trust. Kahili Quarry Road runs from Kilauea Lighthouse Road to the Fish and Wildlife lot and stops there. The Fish and Wildlife lot is owned by the Federal Government. He has contacted the refuge manager and will be asking if it is possible for the owner to temporarily improve the road that goes on to the Fish and Wildlife property. The problem is because nobody has any right to make improvements to the property the road has fallen into disrepair. He will see if they will allow some kind of improvements at least to allow access. His understanding is they are trying to determine what they want to do about public access over that property. Improving the road would at least be a temporary solution so vehicles can get down there.

Chair Anderson stated that during the last status report it was stated that the road was maintained every six months. She questioned what sections of the road have been maintained to which Mr. Graham stated that he doesn't personally know. He thinks its routine maintenance but he will find out. There needs to be some engineering and improvements to the road so it won't require constant maintenance. That's the purpose of getting the permit and resolving the issues with Public Works.

Mr. Kimura stated that it would be nice to fix the road, but in the same sense, you will be having tourists there that shouldn't be there. The currents are very dangerous. If the road is fixed it will be just another tourist attraction. Mr. Graham stated his sense is that community would like to see the road improved to the point where the community can use it but not overwhelmed with visitor traffic. It's sort of a fine balance.

Mr. Kimura noted he kind of likes it the way it is even though there are potholes 4 feet deep. He feels the place will be overwhelmed and included into the 101 things to do on Kauai. Lives will be lost there. There is no life guard. But at the same time, he would like to see the old timers drive down there and not walk through the 4 foot mud hole.

Mr. Katayama stated the 5 year timeline is a year away and he questioned if the conditions will be satisfied to which Mr. Graham replied he believed so. He believes there is a provision that they could ask for an extension but he would very much want to resolve everything by the 5 year timeline. He will do his best.

Mr. Katayama questioned if Mr. Graham would amend his status update to reflect that comment to which Mr. Graham replied yes.

Mr. Kimura questioned if the owner would consider fencing off both sides of the trail so the community would just be within the trail and not venturing outside of trail to which Mr. Graham stated he will take that suggestion to the owner.

Mr. Dahilig stated the appropriate action would be to receive the status report.

**On the motion by Sean Mahoney and seconded by Jan Kimura to receive the status report, all were in favor by unanimous voice vote.**

Mr. Dahilig suggested taking from the table the deferral of Item G.2.b. and subsequently closing that agency hearing.

**On the motion by Jan Kimura and seconded by Wayne Katayama to take from the table item G.2.b., Class IV Zoning Permit Z-2015-9, Use Permit U-2015-8 and Special Management Area Permit SMA (U) 2015-7, the motion carried by unanimous voice vote.**

**On the motion by Sean Mahoney and seconded by Jan Kimura to close the agency hearing, the motion carried by unanimous voice vote.**

The Commission recessed for lunch at 12:29 p.m.

The Commission reconvened at 1:34 p.m.

Class IV Zoning Permit Z-IV-2015-10, Use Permit U-2015-9 and Special Permit SP-2015-2 to conduct agricultural educational programs and tours within a parcel located along the mauka side of Olohena Road in Kapaa Homesteads, situated approx. ½ mile mauka of its intersection with Waipouli Road, further identified as 5730 Olohena Road, Tax Map Key 4-4-03: 045, and affecting approx. 8.654 acres of a larger parcel = *Steelgrass Farm, LLC*.

Mr. Hull read a summary of the Director's report into the record. (On file)

Walton Hong representing the applicant stated the application is for three permits, and the only reason they are seeking the permits is because they are charging a fee; not because they are conducting agricultural activities on the property, not because they are running an agricultural educational program, but only because charging a fee somehow converts what would be a totally permissible agricultural use into a commercial activity. Charging a fee is essential but it is very limited. They have 3 tours a week, each taking 3 hours. They average about 9 vehicles per tour. The reason there are school busses is because they make tours available to school children. They are not the huge Robert's type of busses, they are regular school busses. On occasion there are farmers' conventions held in Hawaii and they want to see the cacao and vanilla and learn about the history and culture. They have an average of one bus per month, on occasion 2 busses a month. These are only on the special occasions when they have school kids or farmers' conventions. The rest of the time, people have to make reservations for the tour. They don't deny that a fee is charged that converts them into a commercial activity. A section of the State Land Use Law states they can hold agricultural educational programs and they believe they met the requirements. However, the County Attorneys said no, because they are charging a fee, it's a commercial activity. They put everything in the application and they are not hiding anything. They have a tiered fee structure. The highest cost is \$60 per applicant which sounds high, but almost half of those who participate in the program pay \$10 or less, or no fees because they are kupuna, members of the community, military, and school children attending the programs. In 2012, the program earned an annual income of \$3,504 or 83 cents per applicant. In 2013, they had a loss of \$4,405 or 88 cents per applicant. They total about 3,200 people during the year. The earlier testimony stating there were 6,000 plus is entirely untrue. It's about 20 people per tour, per day, 3 times a week. They are asking for 5 times a week because school kids may not be able to make it on a Monday, Wednesday, or Friday. It would give them some flexibility on the people who want to participate in the tour. If they are only making 83 cents a person in a good year, and losing 84 cents a person in a bad year, why do they continue? They truly believe there is a future in the cultivation and harvesting of crops such as these and they want to share that experience with others. They are the subject of a number of magazine articles and scientific journals. They participate in different programs for agricultural activities. These are honest to goodness, down to earth people, trying to earn a living from the land. As part of the experience, people get to compare chocolates from different parts of the world. They are in support of the Director's report and recommendation. He also passed out 3 letters in support of the application (on file). Traffic seems to be a big concern. On average there are about 9 vehicles per tour 3

times a week. One of the conditions is whether it creates substantial impact to the neighboring areas. He did not think 27 cars a week is substantial. He stood corrected in that it is not a private roadway. A normal condominium project has a driveway that everyone uses called a common element. In this case, whoever made the project, instead of a roadway as a common element, gave a number of easements; 6 leading up so that every unit or apartment in the condominium project has access. Easement A services lots 1-8 and easement B, 1-12. An owner of a unit doesn't have the right to tell anybody whose benefit the easement is to get to their property that they need permission to cross over the property. That is not the nature of an easement. They have the right to access their unit through the various easements. They actually only use 2 of the 6 easements; easements A & B. The traffic to Steelgrass does not even cross in front of some of the people who are objecting. The easement does cross in front of some people's property, but at the end of the road are other people whose traffic is also being generated in front of these units. One of the people objecting states that it is disturbing their sleep. There are 5 other units further up from their unit. It is not only Steelgrass generating traffic, but also the other 5 units. He was bothered by some of the letters stating that the commercial activities caused them to lose their liability insurance coverage and the policy was canceled. He does not know what was told to the insurance company that caused the policy to be canceled, but shortly thereafter, the association was able to get another policy with the same coverage, at approximately the same cost, without any problems. Steelgrass has maintained some of the easements. Some are paved, some are concrete, and some are gravel. They have been repairing areas that need to be repaired. It may not have been caused by their traffic, but nonetheless they undertook the cost to repair it without contribution from the association or the lot owners.

Mr. Lydgate stated that his adult children are the owners of Steelgrass Farm, but he is the originator of the agricultural plan. It is currently the island's largest grower of vanilla and the chocolate tree theobroma cacao. They believe they offer great promise for the future of Kauai's agricultural economy. Hawaii is the only state where chocolate trees grow and their goal is to make Kauai the Napa Valley of chocolate. They are expanding the orchard 10 fold and as the new trees mature they plan to be one of the largest cacao producers in the state. Since 2007 they have been doing public education on the botany, horticulture, processing, and marketing of vanilla and chocolate. They started out offering demonstrations and workshops and it has evolved into the current regularly scheduled ag educational program. It is located in an agriculturally zoned area, however out of a total of 21 farm dwellings served by the common driveway, they are the only property engaged in genuine agriculture, despite the fact that all the neighbors have a farm dwelling agreement with the county. Because they are the only people actually farming, it is not difficult to understand that some of the neighbors believe they live in a residential area and are objecting to any non-residential activities including traffic. The current program hosts an average of 9 cars per day on 3 weekdays in the morning. If you multiply 21 dwellings times the expected traffic value under normal situations, even in a residential area there is a pretty large volume of traffic expected every day. They add only an average of 9 cars per day on 3 mornings per week. Some of the visitors; senior citizens, student groups, and mainland ag professionals can't always schedule their visits to coincide with the regular tours. The only reason they are asking for 5 days is to have the flexibility to host visitors on days that suit their schedule better. Out of respect for the neighbors who choose not to engage in agriculture, they have done everything in their power to minimize traffic of any kind to the farm. They refuse to publicize their location or street address. They don't want drop in business to

disturb the neighbors. The only time they provide instructions is when someone has made a reservation to attend an educational program. The effect of having to stop the educational program if the permits are not granted is they would have to lay off some of the employees and they would lose a major customer base for the marketing of their products. They sell online to people who have discovered them as a result of visiting the farm. Without direct sales, they would have difficulty continuing to farm. The biggest obstacle to economic success for small farmers is the middle man. All the middle man take a piece of the money. Their ability to connect directly to customers enables them to eliminate the middle man which is an important component to their economic success. The most important impact would be the loss of an important educational venue for future generations who are interested in learning about sustainable, diversified agriculture who might be interested in joining them in increasing the market for Kauai grown chocolate and vanilla.

Mr. Abrams questioned the exclusivity of the easements and their limits to which Mr. Lydgate replied that the easements are in favor of the easement owners and their guests and invitees and there is no limit.

Mr. Abrams questioned active farming on any of the other units to which Mr. Lydgate replied they are the only one out of 21 even though everyone has a farm dwelling.

Mr. Abrams stated he understands the concern with traffic but if it is prohibited, there would in effect be an ag parcel with a number of condominium units that don't farm.

Mr. Kimura noted that one of the neighbors asked if the operation was all legal with the County to which the reply was yes it was. He noted that on April 23 the County sent a letter to cease and desist. Mr. Hong replied that when Mr. Lydgate said everything was pono, what he meant was that when they got the cease and desist letter, he wrote back explaining why they felt it was a permitted agricultural use as an agricultural educational program. They met all of the requirements under the literal reading of the statute. However, the County came back and stated they didn't agree because they were charging a fee. Rather than fighting about it, they submitted for the application which is why they are before the Commission.

Mr. Kimura stated that other concerns were that they never complied with the order and tours and other business have continued. Mr. Hong stated they are still in operation. Upon receiving the letter, they contacted Mr. Henriquez and told him what they were doing. He told them to submit the application and never said to stop everything. He believes the explanation earlier this morning was that the idea is not so much enforcement, but compliance. That is what they are trying to do.

Mr. Kimura asked if they are still in operation even after they were sent the letter to which Mr. Hong replied yes, based on the conversation with Mr. Henriquez.

Mr. Dahilig noted the Department has a lack of injunctive powers. They first notify an applicant that they are not in compliance with the law and we provide an opportunity for them to come into compliance. Mr. Lydgate and Mr. Hong have worked out a compliance plan with the enforcement officer that includes applying for the permit.

Mr. Kimura questioned shouldn't the operation have stopped to which Mr. Dahilig replied they would like people to stop but the State law first encourages compliance. If someone inadvertently did not realize they needed a permit, the position is to show how they chose to come into compliance.

Mr. Katayama questioned the capacity of each tour to which Mr. Hong replied that there is an average of 9 cars per tour with about 20 participants per tour.

Mr. Katayama questioned the maximum capacity for the tour, or if that is what they can get as a result of their marketing. He questioned if they would accommodate 40 people, 2 per car to which Mr. Lydgate replied that there are times when they have as few as 6 or 8 people on the tour in 3 cars and there are times especially during the holiday season and school breaks when they have as many as 30 or 40 people in which case the maximum they've ever had was 17 different cars which is the limit of their parking area. It varies tremendously with the season with 9 as the average.

Mr. Katayama questioned the traffic impact of 17 cars arriving and departing at the same time was reasonable for the roadway to which Mr. Lydgate stated they believe so.

Mr. Katayama questioned if the different owners of the different segments of the road have been approached regarding a maintenance agreement to which Mr. Lydgate replied they have made that offer to the homeowner's association that if it was felt the agricultural program traffic merited their unit making a larger contribution to the annual maintenance fund they would be more than willing to do so. They have not had a response in any formal sense. They stand ready at any time to cooperate with the neighbors in any way.

Mr. Kimura asked if increasing to 5 days would average 45 cars to which Mr. Hong stated that requesting 5 days a week does not necessarily mean they will run one tour every day for 5 days. They want to be able to have some flexibility.

Mr. Kimura stated they would have no control over that. He asked if they would turn away business if the request was there for 5 days a week to which Mr. Lydgate replied they would. It is their family farm. Mr. Kimura stated the Commission could place a condition allowing a school request to come on a day other than the 3 days rather than asking for 5 days to which Mr. Lydgate replied that would be entirely acceptable.

Chair Anderson opened the floor to the member of the public who reserved their testimony until after the applicant presented their information.

The Commission received testimony from Marj Dente. (Written testimony on file). She stated that she lives on Waipouli Road, very near to the applicant and shares the same agricultural water ditch as Steelgrass Farm. She is very involved in the area and started a neighborhood watch in the 1990s. She knows the diligence the Lydgates have used to establish their farm and cacao and bamboo and vanilla business. They are inspirational to her as a farmer. She supports their application to conduct the agricultural programs and tourism on their property.

in the agricultural zone. In her opinion this property and those surrounding it are specifically for this kind of activity. She purchased her acreage in 1989 with the exact same zoning to sign a formal farm dwelling agreement with the County of Kauai that she could build only farm houses to support agriculture and use the property for agricultural purposes which she has done. Every property in this vicinity has the same restrictions. She has farm buildings, she has small buildings. She does not have 2,000-3,000 square foot houses with mowed lawns and tropical expensive plants. The applicants have assured her that no attempt will be made to allow access from Waipouli Road which some of the Lydgate Rise people have proposed. Waipouli Road is a single lane road with no markings and blind curves and it would not be a good idea to have tourists come up and down that road. Regarding the earlier testifiers who stated they are getting dust in their homes because of the cars, she would like to tell them that they should appreciate the concrete driveway most of the way that has been provided by the CPR developers. Her neighborhood, mauka of Steelgrass Farm is gravel. She has donated shade trees to Steelgrass for the cacao. She completely supports this application.

Mr. Dahilig stated that there are recommended conditions. If the Commission wants to take action, they would need to close the agency hearing. If there is a desire to keep the agency hearing open, the matter could be deferred to the next meeting for action.

Mr. Hull stated that yesterday the Fire Department submitted comments for this application requesting more than was originally requested. He noted that there is no building permit associated with this application so the Fire Department is requesting that the Commission impose their conditions including but not limited to widening of the roadway to the site. The Department is still working out whether it will be recommended to the Commission.

Mr. Kimura questioned Board of Health comments regarding sanitary conditions to which Mr. Hull replied they haven't submitted comments at this time. He noted that December 19 was the deadline for comments to be submitted by other agencies. Fire Department had submitted comments at that time, but they resubmitted an updated draft yesterday.

Mr. Abrams questioned the direct relation of the road widening request with the activity to which Mr. Hull stated his understanding was the Fire Department didn't feel that the access was adequate for Fire response to the site.

Mr. Abrams questioned if it may be a condition to work it out with the Fire Department to which Mr. Hull stated primarily they recommended approval, but as a preliminary recommendation they still take into account agency comments that could come in as well as public testimony received today. The Department at the very least would recommend deferring action so they can essentially digest the comments that came from the Fire Department.

Mr. Dahilig noted part of the concern on this particular request is that it is late. They also are obligated to weigh it from a constitutional nexus standpoint. They have to understand whether the requirement could be viewed as an exaction and therefore proportional to what is being proposed. They have to understand what analysis was used before they can recommend any kind of imposition of CIP as part of the required conditions of approval. Mr. Hull added that generally with applications there is a building permit attached to it and those agencies won't take



action on the building permit until the Commission acts in favor of the application. Then the building permit is routed to the respective agencies at which time the Fire Department could hold the applicant to the fire standards. Because there is no building permit associated with the application there is actually no way for the Fire Department to impose the standards.

Mr. Dahilig clarified that Fire Department had opportunity for comments and they provided something before December 19, but then changed their mind after the deadline. They had an opportunity to impose the conditions going into the permit process. It is not an issue of them waiting for the building permit, it is also an issue of them changing their comments.

The Commission took a caption break at 2:25 p.m.

The Commission reconvened at 2:34 p.m.

Mr. Dahilig stated that in discussion with the applicant he believes they have concerns with the comments from the Fire Department. The typical course of action when they are aware of objections or concerns as the application is being put forward, they usually massage the discussions with the agency and work out conditions. They did not have an opportunity to do that because the comments were late. He suggested closing the agency hearing and deferring the item to the next meeting to allow time to work with the Fire Department and the applicant to resolve the potential condition.

Mr. Hong stated they object to the untimeliness of the Fire Department's comments since there was a deadline. They also have a concern regarding the nexus of the comments in requiring them to put in roads, etc., when the activity is wholly outdoors. It has nothing to do with the existing structures on the property. However, they are agreeable to closing agency comments and accepting a deferral to give the Planning Department and staff the opportunity to work with the agency in drafting their ultimate recommendation to the Commission.

Mr. Hull asked for clarification that activities occur outside including the gift shop to which Mr. Hong stated the gift shop is not within the building but on the veranda. There is no real activities within a building. There is a chocolate tasting tent which he doesn't consider a structure.

Chair Anderson noted there were members of the public that may have testified earlier but suggested they had additional testimony. She questioned if there were additional comments from the public and asked them to limit their comments to anything that has not already been addressed and to limit to 2 minutes.

Mr. Dahilig noted there was a previous action deferring the agency hearing. He suggested a motion to reconsider deferral of the agency hearing to reopen for further comments.

**On the motion by Louie Abrams and seconded by Sean Mahoney to reconsider the deferral of the agency hearing, the motion carried by unanimous voice vote.**

The Commission received testimony from Malou Kress, resident of Lydgate Rise CPR. She stated it is not true that they do not farm. They grow their own vegetables. They have mango trees, lychee, and oranges. They share what they have among themselves. She questioned if farming is just selling?

Mr. Abrams stated that the applicant responded to his question. He didn't make any determination.

Chair Anderson requested limiting testimony to not questioning the Commission.

Ms. Kress stated they have repaired pot holes too. She did not believe they have spent money for the gravel to repair potholes. The gravel came from her neighbors. They have done their own repairs to the pot holes.

The Commission received testimony from John Kress. He clarified the driveway is not a common element. They conferred with attorneys who said it's not a common element. The fact that everyone in the association shares it doesn't make it a common element. It is all on private property. He noted that Ms. Dente stated she supports the farm as long as they don't drive on Waipouli Road which means she objects to the traffic which is what they are objecting too. They are not opposed to ag activities. They are just opposed to them using private property of other owners without getting their permission. Last January and February they had at minimum 14 busses over 8 weeks, probably more like 30. They never parked in their parking area because they can't get there. It's not big enough. That's why the Fire Department is asking for a wider road. They did that on Saturday and Sunday. One day there were 4 school busses. He would hope that they would have an opportunity to provide more written testimony at the next meeting so the commissioners can have all the information in front of them to make a consorted decision on the application.

Attorney Jung noted if it is on the next agenda, the Sunshine Law allows people to provide written or verbal testimony on any agenda item.

**On the motion by Louie Abrams and seconded by Sean Mahoney to close the agency hearing, the motion carried by unanimous voice vote.**

Mr. Dahilig requested the item be deferred until February 24, 2015 to which Mr. Hong agreed to waive the time between now and then concerning action.

**On the motion by Louie Abrams and seconded by Sean Mahoney to defer this item to the February 24, 2015 meeting, the motion carried by unanimous voice vote.**

## **ANNOUNCEMENTS**

The next regular scheduled Planning Commission meeting will be held at 9:00 a.m., or shortly thereafter at the Lihue Civic Center, Moikeha Building, Meeting Room 2A-2B, 4444 Rice Street, Lihue, HI 96766 on **Tuesday, January 27, 2015**.

## **ADJOURNMENT**

Chair Anderson adjourned the meeting at 2:47 p.m.

Respectfully submitted by:

---

Duke Nakamatsu,  
Commission Support Clerk

( ) Approved as circulated (add date of meeting approval)

( ) Approved as amended. See minutes of \_\_\_\_\_ meeting.